Ketua Pengarah Pertubuhan Keselamatan Sosial v Jothy a/p Rajoo

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-16–8–01 OF 2020
ABD MAJID J
16 NOVEMBER 2020

Labour Law — Employment — Pension — Appeal — Appellant appealed against decision of Social Security Appellate Board — Whether respondent entitled to receive survivor's pension — Whether board had erred by relying on unverified evidence when it allowed appeal by respondent — Employees' Social Security Act 1960 s 17A

The appellant, the Director General of the Social Security Organisation appealed against the decision of the Social Security Appellate Board ('the board') in allowing the respondent to receive the survivor's pension pursuant to s 17A of the Employees' Social Security Act 1969 ('the Act'). On 15 September 2005, the insured deceased's wife Madam Jothy a/p Rajoo ('respondent') submitted a claim for survivor's pension. The claim was rejected by the appellant on the ground that the deceased did not fulfil the qualifying period under s 17A(3) of the Act. The respondent resubmitted the same and the claim was again rejected on the same ground. The respondent then filed an appeal to the board on 1 August 2019. On 16 August 2019, PERKESO Rawang requested the respondent to submit the deceased's record of contribution to the Employees Provident Fund ('EPF') or *maklumat caruman* to ascertain the number of monthly contributions made for the purposes of s 17A(3) of the Act. A reminder dated 3 September 2019 was sent to the respondent and none was forthcoming. During the proceedings before the board on 6 December 2019, the respondent produced a document entitled *maklumat caruman* purportedly issued by the EPF. The board admitted the said document and upon examining the record of contribution, the board was satisfied that the deceased had made more than sufficient number of monthly contributions as required under s 17A(3) of the Act and the appeal by the respondent was allowed. Learned counsel for the appellant pointed out the respondent never produced the said *maklumat caruman* when requested and although the respondent did not object to the admission of the document the respondent applied for an adjournment to verify the same. Learned counsel pointed out that pursuant to s 56(1) of the Act discretion was given to the appellant to take into account contributions which were deducted but not paid to the organisation. It was submitted that the board had usurped the discretion given to the organisation by taking the said *maklumat caruman* as proof without any verification.

Held, allowing appeal and remitting case to the board:

(1) The burden lies with the respondent to show that the deceased did make sufficient monthly contributions to support the claim. The respondent did discharge the said burden by producing exh 14 but it was only produced during the proceedings. It was only fair and just to allow the appellant to verify the said *maklumat caruman*. Since they were not given the said opportunity, the board had erred by relying on an unverified evidence when it allowed the appeal by the respondent. The board had misdirected itself in taking this unverified document as truth when it was never submitted to the organisation earlier when requested. The board failed to consider s 56(1) of the Act which gave the discretion to the board to consider whether the deceased's employer did in fact failed to remit the deductions made from the deceased's salary to the organisation (see paras 9–10).

[Bahasa Malaysia summary

Perayu adalah Ketua Pengarah Pertubuhan Keselamatan Sosial mengemukakan rayuan terhadap keputusan Lembaga Rayuan Keselamatan Sosial ('lembaga tersebut') yang membenarkan responden menerima pencen penakat menurut s 17A Akta Keselamatan Sosial Pekerja, 1969 ('Akta tersebut'). Pada 15 September 2005, isteri si mati penginsurans, Puan Jothy a/p Rajoo ('responden') mengemukakan tuntutan untuk pencen penakat. Tuntutan tersebut ditolak oleh perayu dengan alasan bahawa si mati tidak memenuhi tempoh kelayakan di bawah s 17A(3) Akta tersebut. Responden mengemukakan semula permohonan dan tuntutan tersebut ditolak sekali lagi dengan alasan yang sama. Responden kemudian mengemukakan rayuan kepada Lembaga pada 1 Ogos 2019. Pada 16 Ogos 2019, PERKESO Rawang meminta responden menyerahkan rekod caruman si mati kepada Kumpulan Wang Simpanan Pekerja ('KWSP') atau maklumat caruman untuk memastikan jumlah caruman bulanan yang dibuat bagi tujuan s 17A(3) Akta tersebut. Peringatan bertarikh 3 September 2019 telah dihantar kepada responden dan tiada siapa yang hadir. Semasa prosiding di hadapan lembaga pada 6 Disember 2019, responden mengemukakan dokumen bertajuk maklumat caruman yang dikatakan disediakan oleh KWSP. Lembaga menerima dokumen tersebut dan setelah memeriksa rekod caruman, lembaga berpuas hati bahawa si mati telah melakukan caruman bulanan lebih dari mencukupi sebagaimana yang diperuntukan di bawah s 17A(3) Akta tersebut dan rayuan oleh responden dibenarkan. Peguamcara yang bijaksana untuk perayu menghujahkan bahawa responden tidak pernah mengemukakan maklumat caruman tersebut apabila diminta dan walaupun responden tidak membantah penerimaan dokumen tersebut, responden memohon penangguhan untuk memeriksanya. Peguamcara yang bijaksana menghujahkan bahawa menurut s 56(1) Akta tersebut budi bicara diberikan kepada perayu untuk mengambil kira caruman yang dipotong tetapi tidak

yang telah dibayar kepada organisasi. Ianya telah dihujahkan bahawa lembaga telah melangkaui budi bicara yang diberikan kepada organisasi dengan mengambil kira maklumat caruman tersebut sebagai bukti tanpa pemeriksaan.

Diputuskan, membenarkan rayuan dan menyerahkan semula kes kepada lembaga:

(1) Beban diletakkan terhadap responden untuk membuktikan bahawa si mati memberikan caruman bulanan yang mencukupi untuk menyokong tuntutan tersebut. Responden melepaskan beban tersebut dengan mengemukakan eksh 14 tetapi ianya hanya dikemukakan semasa prosiding. Ianya adil dan saksama untuk membenarkan perayu mengesahkan maklumat caruman tersebut. Oleh kerana mereka tidak diberi kesempatan tersebut, lembaga telah terkhilaf dengan bergantung kepada bukti tidak disahkan apabila membenarkan rayuan oleh responden. Lembaga telah dengan terkeliru apabila mengambil kira dokumen yang tidak disahkan ini sebagai kebenaran apabila ianya tidak pernah diserahkan kepada organisasi lebih awal apabila diminta. Lembaga gagal mempertimbangkan s 56(1) Akta tersebut yang memberikan budi bicara kepada lembaga untuk mempertimbangkan sama ada majikan si mati sebenarnya gagal mengembalikan potongan yang dibuat dari gaji si mati kepada organisasi (lihat perenggan 9–10).]

Cases referred to

Ketua Pengarah Pertubuhan Keselamatan Sosial v Ismail Mahat [2015] 1 LNS 1391, HC (refd)

Ketua Pengarah Pertubuhan Keselamatan Sosial v Tham Tian Siong [2008] 7 MLJ 854; [2008] 8 CLJ 341, HC (refd)

Ketua Pengarah Pertubuhan Keselamatan Sosial v Vadivelan a/l Sandara Saigara [2009] 1 MLJ 238; [2008] 9 CLJ 428, HC (refd)

Legislation referred to

Employees' Social Security (Social Security Appellate Board Procedure) Regulations 1976 reg 11(g)

Employees' Social Security Act 1969 ss 17A, 17A(3), 56(1), 91(2)

Diba Natalia Ishak (Skrine) for the appellant.
Sivabalan (Goh Wan Ping with him) (Mastura Partnership) for the respondent.

Abd Majid J:

INTRODUCTION

[1] The appellant, the Director General of the Social Security Organisation appealed against the decision of the Social Security Appellate Board ('board') in

allowing the respondent to receive the survivor's pension pursuant to s 17A of the Employees' Social Security Act 1969 ('the Act'). Having heard the arguments I allowed the appeal by remitting the case to the board to allow the Social Security Organisation ('organisation') to verify the document entitled *maklumat caruman* and for the board to reconsider the appeal filed by the respondent.

[2] On 15 September 2005, the insured (deceased)'s wife Madam Jothy a/p Rajoo ('respondent') submitted a claim for survivor's pension. The claim was rejected by the appellant on the ground that the deceased did not fulfil the qualifying period under sub-s 17A(3) of the Act. The respondent thereafter on 17 July 2019 resubmitted the same and the claim was again rejected on the same ground. The respondent then filed an appeal to the board on 1 August 2019.

[3] On 16 August 2019, PERKESO Rawang requested the respondent to submit the deceased's record of contribution to the Employees Provident Fund ('EPF') (*maklumat caruman*) to ascertain the number of monthly contributions made for the purposes of sub-s 17A(3) of the Act. A reminder dated 3 September 2019 was sent to the respondent and none was forthcoming.

[4] During the proceedings before the board on 6 December 2019, the respondent produced a document entitled *maklumat caruman* purportedly issued by the EPF. The board admitted the said document and upon examining the record of contribution, the board was satisfied that the deceased had made more than sufficient number of monthly contributions as required under sub-s 17A(3) of the Act and therefore, the appeal by the respondent was allowed.

[5] The learned counsel for the appellant pointed out the respondent never produced the said *maklumat caruman* when requested and although the respondent did not object to the admission of this document the respondent applied for an adjournment to verify the same. In addition, the learned counsel pointed out that pursuant to sub-s 56(1) of the Act discretion is given to the appellant to take into account contributions which were deducted but not paid to the organisation. It was submitted that the board had usurped the discretion given to the organisation by taking the said *maklumat caruman* as proof without any verification.

[6] The learned counsel for the respondent raised an objection premised upon sub-s 91(2) of the Act that the appeal shall lie if it involved a substantial question of law. As there was no question being formulated for the court's consideration the appeal was not proper. Further the finding of the board was

A one of fact. References were made to *Ketua Pengarah Pertubuhan Keselamatan Sosial v Tham Tian Siong* [2008] 7 MLJ 854; [2008] 8 CLJ 341; *Ketua Pengarah Pertubuhan Keselamatan Sosial v Vadivelan a/l Sandara Saigara* [2009] 1 MLJ 238; [2008] 9 CLJ 428; and *Ketua Pengarah Pertubuhan Keselamatan Sosial v Ismail Mahat* [2015] 1 LNS 1391.

B

[7] It was further submitted by that the board did not erred in considering the *maklumat carian* as the information contained therein contradicted the organisation's evidence (exh 4) which failed to show the correct number of monthly contributions made by the deceased and that the appellant had failed C to explain the absence of the said information in exh 4.

[8] I agreed that whether the deceased had made sufficient monthly contributions is an issue of fact. However the manner of proving the said fact D and admitting the same is a question of law. For a document or evidence to be admitted as proof it has to be relevant and admissible. I mindful of reg 11(g) of the Employees' Social Security (Social Security Appellate Board Procedure) Regulations 1976 which states:

E (g) the provisions of law relating to evidence shall not apply to proceedings before the Board;

Nevertheless I do not think the board can ignore the principles of justice and fairness.

F

[9] The respondent did not make exh 14 available to the organisation when the latter requested for the *maklumat caruman* and was caught by surprise when the said exhibit was produced during the proceedings before the board. To my mind, the organisation rightly made the application for adjournment to G verify the same. Exhibit 14 was indeed crucial to the claim made by the respondent. The burden lies with the respondent to show that the deceased did make sufficient monthly contributions to support the claim. The respondent did discharge the said burden by producing exh 14. However, it was only produced during the proceedings. It is only fair and just to allow the appellant H to verify the said *maklumat caruman*. The learned counsel for the appellant told the court that if the information contained in the *maklumat caruman* was accurate, the organisation would process the said claim. Since they were not given the said opportunity, the board had erred by relying on an unverified evidence when it allowed the appeal by the respondent.

I

[10] Clearly the board had misdirected itself in taking this unverified document as truth when it was never submitted to the organisation earlier when requested. In addition the board failed to consider sub-s 56(1) of the Act which gives the discretion to the board to consider whether the deceased's

employer did in fact failed to remit the deductions made from the deceased's salary to the organisation. Subsection 56(1) reads:

> Section 56 Discretion to compute the qualifying period and the rate of monthly invalidity pension
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> (1) Notwithstanding the provisions of sections 17, 17A, 20 and 29 and the Eighth Schedule, the Organization may take into account, for the purposes of computing the qualifying period for invalidity pension, survivors' pension, funeral benefit and the rates of monthly invalidity pension and survivors' pension, any contribution in respect of an insured person which, though due under this Act, have not actually been paid.
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> (2) If, but for taking into account contributions referred to in subsection (1), a person would not complete the qualifying period or would be entitled to the invalidity pension or survivors' pension at a lower rate, the actuarial present value of the pension or such part of the pension as is attributable to the contributions taken into account in subsection (1), may be recovered by the Organisation from the employer who has failed to pay the aforesaid contributions, or if there is more than one such employer, from all of them, in proportion to the amount of contributions they failed to pay.

[11] The organisation pursuant to this provision can exercise its discretion to override the strict requirement of sub-s 17A(3) of the Act. And to enable it to exercise the said discretion the information contained in the *maklumat caruman* needs to be verified. The board in disallowing the adjournment requested had deprived the organisation from applying sub-s 56(1).

[12] Based on these reasons, I allowed the appeal and remitted the case to the board. The Board shall allow the appellant to verify the *maklumat caruman* and shall reconsider the appeal by the respondent in the event the organisation decides to maintain the decision not to allow the claim submitted by the respondent.

Appeal allowed and case remitted back to the board.

Reported by Mohd Kamarul Anwar